NG ENG HIAM v. NG KEE WEI & ORS.

[Privy Council (Lord Hodson, Lord Guest and Lord Donovan) December 3, 1964]

[Privy Council Appeal No. 14 of 1963]

Company Law — Winding-up — Private company — Deadlock between managing directors — Whether just and equitable to order winding up — Discretion of court — Companies Ordinance, 1940, s. 166(6).

The appellant applied that a company of which he is a permanent director be wound up on the ground that a deadlock had resulted as the two permanent directors in whom were vested the management of the business had fallen out, and that it was just and equitable that the company should be wound up. The application was dismissed by Ong J. ([1962] M.L.J. 285) and an appeal to the Court of Appeal was also dismissed (see [1963] M.L.J. 73). On appeal to the Privy Council,

Held: the question whether a deadlock exists in the management of a company as makes it just and equitable to wind up the company is a question predominantly of fact in each case. The jurisdiction of the court will only be exercised if the court is satisfied that complete deadlock exists in the management of a company. In this case the discretion of the courts below had been properly exercised and there were no grounds upon which such discretion could properly be interfered with.

Cases referred to:—

(1) *Re Sailing Ship Kentmere Co.* [1897] W.N. 58.

(2) *Symington* v. *Symington Quarries* (1906) 8 F. 121.

(3) *Re Yenidje Tobacco Co.* [1916] 2 Ch. 426.

(4) *Lock & Anor.* v. *John Blackwood Ltd.* [1924] A.C. 783.

(5) *Re Michael P. Georges Co. Ltd., Arnold et al* v. *Georges et al* [1948] O.R. 708.

(6) *Re Bondi Better Bananas Ltd., Valario et al* v. *Bondi et al* [1952] 1 D.L.R. 277.

PRIVY COUNCIL.

Reginald W. Goff, Q.C. and *P. G. Clough* for the appellant.

Michael Wheeler, Q.C. and *T. P. E. Curry* for the respondent.

Lord Donovan: This is an appeal from the Court of Appeal of the Supreme Court of the Federation of Malaya. It concerns a company known as Semantan Estate (1952) Limited registered at Kuala Lumpur and carrying on business as rubber planters and estate owners in the Federation. The shareholding is divided equally among two families. The management of the business is vested in two permanent directors, and at a directors' meeting neither of them has a casting vote. They have now fallen out, and it is alleged that a deadlock has resulted with the consequence that it is just and equitable that the company should be wound up. Ong J. and the Court of Appeal of the Federation of Malaya have refused so to order. The appellant now appeals to the Board.

The relevant details of the company's formation and constitution are as follows:—

It was incorporated in 1952 to carry on the business already described. Its nominal capital was $1,000,000 divided into 1,000 shares of $1,000 each, all of which have been issued for cash. Shares totalling one-half of those issued are registered in the names of the appellant and members of his family. Shares totalling the other half are registered in the names of Ng Chin Siu (the second respondent) and the members of his family. Under the articles each shareholder personally present at a general meeting of the company has one vote on a show of hands, and on a poll each shareholder present in person or by proxy has one vote for each share held by him. The chairman of such a meeting has no casting vote.

The appellant and Ng Chin Siu are permanent directors for life or until resignation under the articles of association subject to their holding $20,000 nominal value of shares in the company. This condition has been fulfilled at all material times. The management of the business is confided to these permanent directors, all other directors being subject to their control. A quorum for a directors' meeting is two, and if voting on any question is equally divided the chairman has no casting vote. Ng Chin Siu is chairman of the board.

The shareholders who are members of the family of Ng Chin Siu number more than the shareholders who are members of the family of the appellant. This could, of course, affect the voting on a show of hands, but would have no effect if a poll were demanded. One shareholder who had 10 shares died in 1958 and his shares have not yet been transferred. Nothing turns on this circumstance.

The articles contain restrictions on the right to transfer shares. Except for certain cases of transfers to relatives, no shares can be transferred without the unanimous approval of all the directors. The general manager of the company is Ng Kee Wei (the first respondent) who is also a shareholder and a son of Ng Chin Siu.

The company's business has been carried on successfully and it is still prosperous. But in 1957 the two permanent directors fell out. Two matters are specified by the appellant as the cause. First, at a board meeting in May 1957 Ng Kee Wei asked for additional remuneration for extra work he claimed to have done in connection with a sale of part of one of the company's estates to the Government. The appellant opposed the claim. In the result no extra remuneration has been paid.

Secondly, the appellant had arranged for a contractor to fell certain jungle timber belonging

to the company on terms of making certain payments to the company. Unknown to the appellant, however, a different contractor was engaged to do the work by Ng Chin Siu and Ng Kee Wei on terms less favourable to the company. It has now been explained that the contractor found by the appellant failed to sign the contract and pay the required deposit; and that before the second contractor was found, the price of jungle timber fell. This explanation is not disputed, nor is it said to be insufficient; but the appellant complained that he was never consulted in relation to the appointment of the second contractor, or as regards the terms arranged with him.

These two incidents, comparatively trivial in themselves, have led to unfortunate results. The appellant in an affidavit verifying his petition complains that he has not received at the proper time, and latterly not at all, the monthly accounts of expenditure actual and estimated which he used to receive: that formal board meetings have ceased to be held: that no general meeting of the company was held in 1958, 1959 and 1960: and that the company's books of account have been removed from the registered office of the company to the private residence of his co-director, which in fact adjoins the registered office, and that he has been unable to obtain access to them. Accordingly, says the appellant, it has become impossible to carry on the company's business properly and regularly, and it is therefore just and equitable that it should be wound up. The shareholders of the company being members of the appellant's family support his petition.

The foregoing allegations were answered in an affidavit made by Ng Kee Wei, the general manager of the company. Ng Chin Siu lodged no affidavit. Ng Kee Wei deposed that full accounts and estimates had been continuously available to the appellant at the company's office and that no obstacle had been or would be put in his way in inspecting and examining them: that audited accounts and balance sheets had always been sent to him: that board meetings could not be held (otherwise than by circular) because the appellant wanted to bring his lawyer with him and would not attend without: that general meetings of the company were not held at the proper time in 1958, 1959 and 1960 because of doubts being felt as to whether they could properly be convened in the absence of the appellant's consent as one of the two permanent directors: that a general meeting was held in 1961 when the appellant unsuccessfully demanded an adjournment to enable him to inspect the books of account which he had been free to do beforehand: and that the truth of the whole matter is that since 1957 the appellant has wanted the company to be wound up, and that this desire not having been met, he has purposely neglected to co-operate in the running of the business. Ng Kee Wei goes on to swear that the company's business is nevertheless in a flourishing condition, and that its affairs are being conducted smoothly. The shareholders being members of the family of Ng Chin Siu oppose the petition.

In these circumstances Ong J. before whom the petition to wind up came in December 1961 dismissed it. Notice of appeal being given the learned judge thereupon gave his grounds in writing in February 1962. No oral evidence had been given before him, the parties relying upon their affidavits above summarised, as to which there was no cross-examination. After considering the facts at some length the learned judge in his judgment concludes that pique on the part of the appellant over the two incidents of 1957 was the root of the trouble; that the appellant "had been more unreasonable than co-operative" and that any deadlock had been created by him. The interests of the shareholders had to be considered: the company could still carry on with advantage and profit to all of them, and it was not just and equitable that it should be wound up.

The appellant appealed to the Court of Appeal at Kuala Lumpur and the appeal came on for hearing on the 15th and 16th October 1962 when judgment was reserved. On the 3rd December 1962 the court gave judgment unanimously dismissing the appeal.

Thomson C.J. drew attention to the careful way in which the management of the company had been equally divided in the articles between the two permanent directors, and to the absence of any provision for resolving differences between them. From this he drew the conclusion that both permanent directors had undertaken to display more than usual tolerance and forbearance of each other's point of view in relation to the affairs of the company. It was against this background that the case should be considered; and on the footing that the two incidents of 1957 alone had led the appellant to conclude that co-operation with his fellow permanent director had become impossible, then the appellant was failing in his obligation to exercise such tolerance and forbearance. The learned Chief Justice went on to observe that even though the two permanent directors were not on speaking terms there was no suggestion that the business was not being carried on efficiently: and no suggestion of any lack of probity on either side. In the circumstances he failed to see any reason why it should be regarded as just and equitable for the company to be wound up.

Hill J.A., after reciting the facts and the

arguments, expressed the view that the irregularity committed in moving the books of account from the registered office to the residence of Ng Chin Siu next door was a technical matter which, for present purposes, could be ignored. Similarly, the other alleged contraventions of the articles of association did not require consideration since they were in any event not material to the real issue which was whether there was a deadlock due to differences between the two directors. As to this he concluded that there seemed to be reasonable hope of reconciliation and co-operation between the two directors if ordinary good sense were employed. Accordingly it was not just and equitable to wind the company up.

Barakbah J.A. also took the view that it was not impossible that the parties concerned could resolve their differences and carry on in the spirit of co-operation that had existed from 1952 to 1957. In all the circumstances of the case he said it would not appear to be in the interests of the shareholders that the business should be wound up.

The jurisdiction to wind up a company if the court thinks it just and equitable to do so is conferred by section 166(6) of the Companies Ordinance 1940, and that section follows the form of section 222 of the English Companies Act 1948. Hence a considerable number of English cases dealing with this jurisdiction have been quoted to the board which bear upon the problem whether such a deadlock existed in the affairs of the company as to make it just and equitable to wind up. These cases include *Re Sailing Ship Kentmere Co.*[1]: *Symington* v. *Symington's Quarries*[2]: *Re Yenidje Tobacco Co.*[3]: *Loch and another* v. *John Blackwood Ltd.*[4] and other cases.

Among the Dominion cases cited to the board were:—*Re Michael P. Georges Co. Ltd.; Arnold et al* v. *Georges et al,*[5] and *Re Bondi Better Bananas Ltd.; Valario et al* v. *Bondi et al.*[6]

Their Lordships do not propose to review these authorities in detail. The question whether such a deadlock exists as makes it just and equitable to wind the company up is a question predominantly of fact in each case. The principle is clear that if the court is satisfied that complete deadlock exists in the management of a company the jurisdiction will be exercised. See *Buckley* on Companies 13th Edition page 456. It may be that the jurisdiction will be more readily exercised where (as is alleged to be the case here) although the business is carried on by means of a private limited company, the case is one not unlike a partnership. In the present case the courts below have held that such a deadlock as would make it just and equitable to wind the company up does not exist. Ong J. said: "I could not, and still cannot believe, that businessman of the calibre and standing of the petitioner (i.e. the appellant) and Ng Chin Siu cannot, if they have to, be large-hearted enough to treat a mutual misunderstanding as if there had never been one."

Hill J.A. said: "I do not consider that a stage of such continued quarrelling and animosity has yet been reached between the petitioner and the second respondent" (i.e. such precludes all reasonable hope of reconciliation and friendly co-operation) "and there seems to be reasonable hope of reconciliation and co-operation if ordinary good sense is employed": and Barakbah J.A. concluded: "this is a family concern and I feel it would not be impossible for them to resolve their differences and carry on with the spirit of co-operation that had existed from 1952 to 1957".

Their Lordships cannot override these views, even if they felt disposed to do so, which they do not. In addition the fact is that between the year 1957 when the trouble began, up to at least the year 1962 when the matter came before the Court of Appeal, the business had been carried on smoothly and successfully. Further, although in this particular case this consideration is not crucial, Ong J. and Thomson C.J. clearly took the view that the blame for the difficulties which have arisen rested largely with the appellant himself, and both courts considered that in all the circumstances it would be unfair to the shareholders to wind the company up. In the exercise of their discretion both courts therefore declined to make the order.

Much was made by the appellant in argument before the board of an incident which occurred at the annual general meeting held in May 1961 at which the accounts and balance sheets for 1957, 1958 and 1959 were presented. At this meeting, as already mentioned, the appellant asked that consideration of the accounts be adjourned to enable him to inspect the books of account and demanded that a vote be taken on this proposal by means of a poll. This demand was refused. The appellant therefore left the meeting, since on a vote by a show of hands he and his supporters would be in a minority. Thus, say the appellant, when he sought to do what he had been urged to do, namely to attend at the office and inspect the accounts, he was denied proper facilities for doing so.

The courts below obviously found little substance in this complaint, and did not regard it as having a very direct bearing on the question of deadlock. Ong J. did not deal with it at all. In the Court of Appeal the Chief Justice and Hill

J.A. treated the matter almost as irrelevant. The reason no doubt was that the appellant had had ample opportunity before the annual general meeting in question to attend at the company's office had he desired to do so and inspect the books of account. In the circumstances it is not material to consider whether his demand for a poll was properly refused or not. Under the articles the matter is debateable.

Their Lordships at the end of the full and vigorous argument for the appellant did not feel it necessary to call upon counsel for the respondents to reply. In their view this is clearly a case where the discretion of the courts below was properly exercised, and there are no grounds upon which their Lordships could properly interfere with it. They will accordingly report to the Head of Malaysia their opinion that this appeal should be dismissed and that the appellant should pay the costs.

Appeal dismissed.

Solicitors: *Lovell, White & King; Peacock & Goddard.*

PUBLIC PROSECUTOR v. LO AH ENG

[F.C. (Wylie C.J. (Borneo), Tan Ah Tah F.J. and Harley J.) December 3, 1964]

[Kuching — Federal Court Criminal Reference No. 1 of 1964]

Evidence — Adverse witness — No power to cross-examine one's own — Evidence Ordinance (Sarawak Cap. 54), ss. 140 and 157.

The question raised in this criminal reference was: "Whether a witness who in the opinion of the judge proves adverse to the party calling him may be cross-examined by such party, under the Evidence Ordinance of Sarawak".

Held: there is no general power under the Evidence Ordinance of Sarawak under which a party may be permitted to put to its own witness who in the opinion of the court proves adverse, questions that may normally be put only in cross-examination as defined in section 140 of the said Ordinance.

[Editorial Note: See *Public Prosecutor* v. *Loh Ah Eng* [1964] M.L.J. 396 and the Editorial Note thereto].

FEDERAL COURT.

C. T.Tan (Assistant Attorney-General) for the appellant.

George Seah for the respondent.

Cur. Adv. Vult.

Wylie C.J. (Borneo): The question to be answered in this criminal reference, as amended at the hearing of the application, is as follows:—

"Whether a witness who in the opinion of the judge proves adverse to the party calling him may be cross-examined by such party, under the Evidence Ordinance of Sarawak."

As the argument for the appellant developed, it became likely that the question to which the answer of this court was sought, might more correctly be stated as a question whether such cross-examination may be allowed notwithstanding the provisions of the Ordinance. However, the views to be expressed by the court will no doubt dispose of the real question involved, irrespective of the form in which it was posed for the court's consideration.

These proceedings arise out of a trial in the High Court at Kuching in which the respondent was acquitted of the offence with which he was charged. In the course of the trial two witnesses for the prosecution were ruled adverse and the Deputy Public Prosecutor, in order to discredit them proved, in each case, a statement the witness had made to the police by calling the police officer who had taken the statement. Prior to this proof, each witness had admitted making his statement when it was shown to him by the Deputy Public Prosecutor, apparently pursuant to section 157 of the Evidence Ordinance. In addition, when the statement was translated to them, the witnesses then under cross-examination by the Deputy Public Prosecutor, said that the statements were true. In one case, apparently the whole statement was put in detail to the witness. The prosecution then sought to rely on the contents of each statement to the extent that was warranted in the special circumstances, not as a previous statement, but as having been incorporated by the witness's answers in his evidence given in court.

In his judgment, the judge expressed the view that the contents of the statement could in this manner be made part of the evidence of the witness given in court, if in fact there is a right or power to cross-examine an adverse witness by the party calling him. He came to the conclusion that there was no such right in Sarawak and that therefore that part of each witness's evidence given in reply to cross-examination by the Deputy Public Prosecutor must be disregarded by the court. He based this conclusion on the view that the Evidence Ordinance constituted a complete code of the law relating to evidence in Sarawak and that therefore common law did not apply to this question. He could find no provision in the Ordinance corresponding to section 154 of the Indian Evidence Act, 1872, which gives power to allow a party to cross-examine his own witness, and considered that, as section 157 did not authorise this course, a similar power did not exist in Sarawak. The matter has been brought before this court for it to determine whether the trial judge was correct in his ruling that a party may not, in Sarawak, cross-examine his own witness who proves to be adverse.

In an able and well developed argument, the